



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NOV 20 2017

Enrich Horgan

Woods Hole, MA 02543

RE: MUR 7129

Dear Mr. Horgan:

The Federal Election Commission reviewed the allegations in your complaint received on August 22, 2016. On November 14, 2017, based upon the information provided in the complaint, and information provided by the respondents, the Commission decided to exercise its prosecutorial discretion to dismiss the allegations as to the Committee to Elect Tom O'Malley and John Griffin in his official capacity as treasurer, and Brad Winegard, and close its file in this matter. Accordingly, the Commission closed its file in this matter on November 14, 2017. A copy of the Factual and Legal Analysis, which more fully explains the basis for the Commission's decision, is enclosed.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 52 U.S.C. § 30109(a)(8).

Sincerely,

Lisa J. Stevenson
Acting General Counsel

BY: Jeff S. Jordan
Assistant General Counsel

Enclosure
Factual and Legal Analysis

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Committee to Elect Tom O'Malley, MUR 7129
and John Griffin, as treasurer
(collectively "the Committee")
Brad Winegard

I. INTRODUCTION

This matter was generated by a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations by Committee to Elect Tom O'Malley and John Griffin in his official capacity as treasurer (the "Committee")¹, and Brad Winegard. It was scored as a low-rated matter under the Enforcement Priority System, by which the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

The Complaint alleges that a statement posted on the Committee's website solicited anonymous \$200 cash contributions in envelopes with no return addresses, addressing potential supporters who were "still subject to the [H]atch [A]ct."² Compl. at 1. The Complaint alleges that a supporter, not the candidate, likely wrote the statement, and the Committee's website displayed it for months.³ *Id.* The statement also includes a request for \$100 contributions to

¹ O'Malley, a 2016 candidate for the Massachusetts 9th Congressional District, lost in the September 8, 2016, Republican primary with 38% of the vote.

² The statement reads "For those still subject to the [H]atch [A]ct sticking a couple Franklins in an envelope with no return address is also legit." Compl. at 1, Attach. at 2. This statement follows the mail and online addresses for the Committee. The Complaint provides the campaign website, <http://www.omalleyforcongress.com/endorsements>. This URL no longer links to the campaign website, however the page is viewable via the Internet Archive: <https://web.archive.org/web/20160818204418/http://www.omalleyforcongress.com:80/endorsements>.

³ The Complaint named Lieutenant Colonel David G. Bolgiano as the supporter who wrote the statement, and the printout attached to the Complaint is somewhat ambiguous: the names "Barefoot Boatswain and Folais

O'Malley: "[t]he Challenge is from me personally and is \$100 from every member in this room." Compl., Attach. at 1.

O'Malley concedes he should have removed "the Hatch Act comment" before posting the statement on the Committee's website, but explains that the statement was an endorsement from a former colleague, Respondent Brad Winegard, that was initially placed on a private social media page. Resp. at 1. Further, the Committee states that the request for cash donations was meant to be sarcastic, and the Committee's failure to remove it was an oversight. *Id.* The Committee states it did not intend to solicit, nor did it accept, any cash donations. *Id.* The Response includes a letter from Winegard, who explains that he meant the statement to be satirical and directed only to a private social media group, he "do[es] not solicit funds for anything," and he only sought "prayers and moral support" for O'Malley. *Id.* at 2.

B. Legal Analysis

The Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations state that no person shall make contributions to a candidate for federal office of currency of the United States, or of any foreign country, which in the aggregate exceed \$100.⁴ Commission regulations further require a candidate or committee receiving an anonymous cash contribution in excess of \$50 to promptly dispose of the amount over \$50.⁵ The Act and the Commission's regulations prohibit federal candidates and their agents from soliciting funds that do not comply with the Act's prohibitions, limitations, and reporting requirements.⁶ The

Casteal" are displayed above the statement, and Bolgiano's name is displayed below it. However, Respondents state that Senior Chief Petty Officer Brad Winegard wrote the statement and attach Winegard's letter claiming responsibility.

⁴ 52 U.S.C. § 30123; 11 C.F.R. § 110.4(c)(1).

⁵ 11 C.F.R. § 110.4(c)(3).

⁶ 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61.

1 Commission's regulations define "solicit" broadly as "to ask, request, or recommend, explicitly
2 or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise
3 provide anything of value," and states that the communication should be "construed as
4 reasonably understood in the context in which it is made"⁷ This test is objective and does not
5 turn on the subjective interpretations of the speaker or the recipients.⁸ The Commission
6 explained that its objective standard "hinges on whether the recipient should have reasonably
7 understood that a solicitation was made," and further explained that "words that would by their
8 plain meaning normally be understood as a solicitation, may not be a solicitation when
9 considered in context."⁹

10 The Commission has recognized that a request for money that is made in jest is not a
11 solicitation.¹⁰ The Committee maintains that the comment regarding anonymous cash donations
12 was a sarcastic joke made by a friend and not meant to be understood as a solicitation. The
13 friend provided a signed letter supporting that contention, and the Committee states that its
14 failure to remove that statement from the endorsement was unintended. The Committee states,
15 and its reports reflect, that it did not accept any cash contributions.¹¹

16 Based on seemingly contradictory information in the record, it is not clear whether
17 Winegard's suggestion that readers put \$200 in an unmarked envelope was meant as sarcasm. In

⁷ 11 C.F.R. § 300.2(m).

⁸ *Id.*, see also Definitions of "Solicit" and "Direct"; Final Rule; 71 Fed. Reg. 13926-02, 13928 (March 20, 2006).

⁹ 71 Fed. Reg. 13929.

¹⁰ See Factual and Legal Analysis at 6-7, MUR 6939 (Mike Huckabee, *et al.*).

¹¹ The Committee's FEC filings do not indicate that the Committee received any cash contributions. See Committee to Elect Tom O'Malley 2016 April Quarterly Report, filed March 30, 2016; Committee to Elect Tom O'Malley 2016 July Quarterly Report, filed June 30, 2016; Committee to Elect Tom O'Malley 2016 Pre-Primary Report, filed September 7, 2016; Committee to Elect Tom O'Malley 2016 October Quarterly Report, filed October 14, 2016.

1 Winegard's endorsement on the website, he clearly solicits \$100 contributions, but in the
2 Response, he states that he does not solicit funds. However, because the Committee's reports do
3 not reveal any cash contributions, the Committee admits that it should not have posted
4 Winegard's statement regarding anonymous cash contributions, and the amounts requested were
5 somewhat modest,¹² the Commission dismisses the allegations consistent with the Commission's
6 prosecutorial discretion to determine the proper ordering of its priorities and use of agency
7 resources. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

¹² In comparison, the request in MUR 6939 that the Commission found to be in jest was for a million dollars.